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Some Specific Problems Raised by Article 9 of the Uniform Commercial Code in Ohio

Lawrence J. Burns

Between the date the Uniform Commercial Code was signed by the governor of Ohio as the final step in its promulgation¹ and the date upon which it went into effect² some fourteen months elapsed. The purpose of this delay was to enable those affected by the adoption of the Code sufficient time to become familiar with its provisions.

Once the Code was signed by the governor, little time was lost by interested groups in examining its contents. Lawyers, bankers, credit

men, and other interested groups immediately began holding discussions and seminars on the subject matter of the new law.³ It soon became apparent that some problems had come into existence with the adoption of the Code. Con-

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sidering the size and scope of the act and the amount of study and discussion devoted to it both before and since its adoption, it is a tribute to the authors that so few problems have come to light.

Only those problems which have arisen from the adoption of article 9 of the Uniform Commercial Code in Ohio are considered here. Article 9 deals with secured transactions and was probably the most thoroughly studied and discussed of the nine substantive articles contained in the Code. It should be noted that Ohio did not adopt the Uniform Commercial Code numbering system.⁴ The provisions of article 9 are to be found in chapter 1309 of the Revised Code of Ohio. Those who may have occasion to examine decisions rendered in other jurisdictions or literature upon the Code, as the author has done, may find the use of the Ohio Revised Code numbering system a minor but annoying problem.

1. May 18, 1961.

2. July 1, 1962.

3. The Ohio Bankers Association sponsored a series of nine conferences on the Code in the fall of 1961. The Ohio Legal Center conducted a series of four two and one half-day and eight one-day seminars on the Code. Seminars were also held by individual bar associations.

4. Under the Ohio Revised Code numbering system article 1 is found in chapter 1301, article 2 in chapter 1302, and so on. Section 1309.02(A)(2) of the Ohio Revised Code would be Uniform Commercial Code section 9-102(1)(b).

The problem areas arising from the adoption of article 9 may be classified as those resulting from ambiguities, conflicts, or omissions in the act as adopted in Ohio; those resulting from particular sections of the act being made subject to or referring to non-Code Ohio law; and those resulting from that portion of the act relating to transactions occurring prior to July 1, 1962.⁵

AMBIGUITIES, CONFLICTS, AND OMISSIONS

In this category there are three major areas worthy of note: motor vehicles, default and deficiency, and fixtures.

Motor Vehicles — Ohio Revised Code Section 1309.21⁶

What appears to be a major conflict in the provisions of chapter 1309 of the Ohio Revised Code appears in section 1309.21. This section is quite clear in stating that a financing statement must be filed to perfect a security interest in a motor vehicle required to be licensed. Yet sections 1309.21 (C)-(D)⁷ read as follows:

(C) The filing provisions of section 1309.01 to 1309.50, inclusive, of the Revised Code, do not apply to a security interest in property subject to a statute:

....

(2) of this state (including section 1701.66 of the Revised Code) which provides for central filing of, or which requires indication on a certificate of title of such security interests in such property or which requires possession of a certificate of title.

(D) A security interest in property covered by division (C) of this section can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official or by otherwise complying with the procedure set forth in such statute.

At first examination it seems evident that this is a direct conflict. Motor vehicles are required to be licensed in Ohio⁸ and are also subject to a statute which requires indication of security interests on or possession of a certificate of title.⁹ The conflict appears to be of lesser degree when

5. 129 Ohio Laws 13, 182 (1961).

6. UCC § 9-302. Ohio Revised Code section 1309.21 provides:

"(A) A financing statement must be filed to perfect all security interests except the following:

....

(3) a purchase money security interest in farm equipment having a purchase price not in excess of five hundred dollars; but filing is required for a fixture under section 1309.32 of the Revised Code or for a motor vehicle required to be licensed;

(4) a purchase money security interest in consumer goods; but filing is required for a fixture under section 1309.32 of the Revised Code or for a motor vehicle required to be licensed..."

7. UCC §§ 9-302(3)-(4).

8. OHIO REV. CODE ch. 4503.

9. OHIO REV. CODE § 4505.13.

one considers that the Uniform Commercial Code was drafted for adoption in all of the states, some having certificate of title acts and some not. In a state having no such certificate of title act, the Uniform Commercial Code equivalent of Ohio Revised Code section 1309.21(C)(2) would be inapplicable and the filing of a financing statement to perfect a security interest in a motor vehicle required to be licensed would be necessary under Uniform Commercial Code sections 9-302(1)(c)-(d).

The drafters of the Code sought to make it clear that no such conflict existed by stating in the official code comment to section 9-302:

. . . many states have enacted certificate of title laws covering motor vehicles and the like. If a certificate of title law requires the indication of all security interests on the certificate, subsection (3)(b) exempts transactions covered by the law from the filing requirements of this article.¹⁰

The question presented by these apparently conflicting sections has been resolved in the state of Pennsylvania by the decision in the case of *Girard Trust Corn Exchange Bank vs. Warren Lepley Ford, Incorporated* (No. 2).¹¹ The court held in that case:

A notation on a certificate of title of a motor vehicle of a bank's encumbrance thereon is equivalent to the filing of a financing statement required under section 9-302 of the Uniform Commercial Code, thereby giving the bank a perfected security interest in the vehicle, and under sections 9-201 and 9-303 this security interest is effective against the receivers in equity of the owner of the vehicle so as to entitle the bank to possession.¹²

This decision was based upon the 1952 draft of the Uniform Commercial Code. Although the sections considered were changed in the later version adopted in Ohio, the changes were not such as to have altered the above decision.

That this same result was intended to be reached by the Ohio General Assembly is reflected by the provisions of Ohio Revised Code section 4505.13, which was amended by the enactment of the Uniform Commercial Code. This section states that chapter 1309 does not permit or require the filing of a security interest in a motor vehicle.¹³

The foregoing discussion is clearly applicable to motor vehicles for which a certificate of title is required to be issued. However, an even more interesting problem arises out of Ohio Revised Code sections 1309.21(A)(3)-(4), (C)(2).¹⁴ Must a financing statement be filed.

10. UCC § 9-302, comment 8.

11. 13 Pa. D. & C.2d 119 (Philadelphia County Ct. 1957).

12. *Id.* at 120.

13. Ohio Revised Code section 4505.13 provides: "Sections 1309.01 to 1309.50, inclusive, of the Revised Code, do not permit or require the deposit, filing, or other record of a security interest covering a motor vehicle . . ."

14. UCC §§ 9-302(1)(c)-(d), (3)(b).

to perfect a security interest in motor vehicles in the hands of a dealer? Does it make any difference whether the vehicles are new or used? In either event they are the dealer's inventory. This question arises by virtue of the fact that section 1309.21(C)(2) applies only to property subject to a statute "... which provides for central filing of, or which requires indication on a certificate of title of such security interests in such property or which requires possession of a certificate of title."¹⁵

This problem is brought into sharper focus by decisions rendered in Pennsylvania construing these sections as not exempting new or used motor vehicles, held as inventory, from the filing requirements of the Code.¹⁶ Possibly, as a result of these decisions, secured parties claiming a security interest in the inventory of motor vehicle dealers located in Ohio have been filing financing statements with the Secretary of State.

The Pennsylvania decisions, however, were based upon the motor vehicle code of that state.¹⁷ Under that act, motor vehicle dealers "... need not obtain certificates of title for new motor vehicles ... until and before sale thereof"¹⁸ and in the case of used cars, "... shall not be required to apply for a certificate of title ..."¹⁹ but are required to notify the department of the acquisition of the vehicle within ten days.

The Ohio Certificate of Motor Vehicle Title Act²⁰ is somewhat different. A dealer may not sell or display for sale a *used* motor vehicle without first having obtained a certificate of title in his name.²¹ It would, therefore, seem that the Pennsylvania decisions, in so far as they relate to *used* motor vehicles, are inapplicable in Ohio.

The Ohio Certificate of Motor Vehicle Title Act does not require a dealer to obtain a certificate of title upon *new* motor vehicles. He must obtain a manufacturer's or importer's certificate. No mention of manufacturer's or importer's certificates is made in Ohio Revised Code sections 1309.21(C)(2), (D).²² Are new motor vehicles, in the hands of a

15. UCC § 9-302(3)(b), codified as OHIO REV. CODE 1309.21(C)(2).

16. *Howarth v. Universal CIT*, 203 F. Supp. 284 (W. D. Pa. 1962); *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961); *Taylor Motor Rental, Inc. v. Associates Discount Corp.*, 196 Pa. Super. 182, 173 A.2d 688 (1961); *Girard Trust Corn Exch. Bank v. Warren Lepley Ford Inc.*, (No. 1) 12 Pa. D. & C. 2d 351 (Philadelphia County Ct. 1957).

17. PA. STAT. ANN. tit. 75, §§ 201(b), 207(c) (1960).

18. PA. STAT. ANN. tit. 75, § 201(b) (1960).

19. PA. STAT. ANN. tit. 75, § 207(c) (1960).

20. 117 Ohio Laws 373 (1953), codified as OHIO REV. CODE ch. 4505.

21. Ohio Revised Code section 4505.18 provides:

"No person shall:

...

(B) Display for sale or sell as a dealer or acting on behalf of a dealer, a motor vehicle without having obtained a manufacturer's or importer's certificate or a certificate of title therefor as provided in sections 4505.01 to 4505.19, inclusive, of the Revised Code ..."

22. UCC §§ 9-302(3)(b), (4).

dealer, for which no certificate of title is required, exempt by the provision of section 1309.21(C)(2), (D) from the filing requirements of the Uniform Commercial Code? From an examination of that section alone it would appear that they are not.

However, two other sections must be considered. Ohio Revised Code section 1309.26(A)²³ permits a buyer in the ordinary course of business to take free of a security interest created by his seller even though he has knowledge of the security interest and it has been perfected. However, by virtue of section 1309.26(C)²⁴ this is not applicable with respect to a security interest in motor vehicles ". . . as defined in section 4505.01 of the Revised Code."²⁵ Note that this exception is not limited to motor vehicles for which a certificate of title is required. Section 1309.26(C) is peculiar to Ohio; it is not contained in the uniform act.

Ohio Revised Code section 4505.13 is a statute dealing with a specific subject, security interests in motor vehicles. Under the rules of statutory construction the specific must prevail over the general.²⁶ Section 4505.13 provides in part:

Sections 1309.01 to 1309.50, inclusive, of the Revised Code, do not permit or require the deposit, filing, or other record of a security interest covering a motor vehicle. Any security agreement covering a security interest in a motor vehicle, if such instrument is accompanied by delivery of a manufacturer's or importer's certificate and followed by actual and continued possession of such certificate by the holder of said instrument, or, in the case of a certificate of title, if a notation of such instrument has been made by the clerk of the court of common pleas on the face of such certificate, shall be valid as against the creditors of the debtor, whether armed with process or not, and against subsequent purchasers, secured parties, and other lienholders or claimaints.

The intent of the Ohio legislature in enacting 1961 Amended Senate Bill No. 5²⁷ seems clearly to have been to require possession of a manufacturer's certificate of origin or notation on a certificate of title as the means of perfecting a security interest in motor vehicles and not the filing of a financing statement.

23. UCC § 9-307(1). Ohio Revised Code section 1309.26(A) provides:

"A buyer in ordinary course of business, as defined in division (I) of section 1301.01 of the Revised Code, other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."

24. This section provides:

"The provisions of divisions (A) and (B) of this section shall not apply to a security interest in motor vehicles as defined in section 4505.01 of the Revised Code."

25. Ohio Revised Code section 4505.01 provides:

"As used in sections 4505.01 to 4505.19, inclusive, of the Revised Code, 'motor vehicle' includes house trailers or house semitrailers designed for human habitation and trailers and semitrailers whose weight exceeds four thousand pounds. . . ."

26. 50 OHIO JUR. 2d, *Statutes* § 10 (1961) provides:

"Thus, a special statute covering a particular subject matter must be read as an exception to a statute covering the same and other subjects in general terms."

27. 120 Ohio Laws 13 (1961).

Default and Deficiency

All sections of Ohio Revised Code chapter 1319 relating to chattel mortgages were repealed by the enactment of the Uniform Commercial Code, except sections 1319.06²⁸ and 1319.07.

Section 1319.07 thus remains the law on and after July 1, 1962. This section prohibits a chattel mortgagee, who has repossessed his security before foreclosure, from obtaining a deficiency judgment, unless he has given at least ten-days notice of the time, place, and minimum price for which the property may be sold together with a statement that the mortgagor may be liable for any deficiency.

Section 1309.47²⁹ relates to disposition of collateral by the secured party upon default. Notice of disposition is not required under this section if the collateral is perishable, threatens to decline rapidly in value, or is of a type customarily sold on a recognized market. In all other cases, *reasonable* notice of the time and place of any public sale or of the time after which a private sale or other disposition is to be made is required. There is no minimum time established by section 1309.47 for the notice, as in section 1319.07.

The failure to repeal section 1319.07 was not an oversight for an additional subsection³⁰ was added to section 1309.47 making the same subject to the limitations of section 1319.07.

This apparent conflict raises certain problems. Must a secured party give ten-days notice prior to disposition of the collateral in all cases before he may recover a deficiency judgment? Does this limitation apply to all transactions regardless of form or is it limited to those in which a chattel mortgage is used or the security agreement by its provisions equates a chattel mortgage type transaction? Is the limitation meaningless as we no longer have chattel mortgages under the Ohio Revised Code?

This problem is peculiar to the Uniform Commercial Code as it was adopted in Ohio. Thus, a review of decisions from other states relating to the Code will be of no avail.

There should be no question that the legislature of Ohio intended the limitations of section 1319.07 to apply to the secured party in at least some instances.

Prior to the enactment of the Uniform Commercial Code, the provisions of section 1319.07 applied only to chattel mortgagees. They did

28. Ohio Revised Code section 1319.06 provides:

"No husband or wife shall create any lien by chattel mortgage or otherwise upon any personal household property owned by either or both of them, without the joint consent of both husband and wife. No such mortgage is valid unless executed by both husband and wife.

"This section does not apply to any mortgage or lien for the purchase price of such property."

29. UCC § 9-504.

30. OHIO REV. CODE § 1309.47(F).

not apply to conditional vendors, assignors of accounts receivable, or secured parties under the trust receipts or factors lien acts. The language of the section cited has not been changed. By its terms a *chattel mortgagee* may not recover a deficiency unless the required notice has been given.

The terms "debtor" and "secured party" have been substituted for "mortgagor," "mortgagee," "conditional vendor," and "conditional vendee."³¹ If the legislature had intended the limitations to apply to all secured parties, it would have used that term.³² The legislature must be presumed to know the meaning of the language which it uses.³³ The term "mortgagee" has had a fixed meaning in the law for many years prior to the enactment of the Uniform Commercial Code as has the term "chattel mortgage." A chattel mortgage is a transfer of the title of personal property as security for a debt.³⁴

These factors would lead us to believe that only when the secured party qualifies as a chattel mortgagee should the limitations of 1319.07 apply. Under the above definition this would occur when the debtor has transferred title to the collateral as security. Although this procedure is not required under the Code, neither is it prohibited. When this method of financing is followed, regardless of the designation given the instrument (security agreement-chattel mortgage), the secured party is a "chattel mortgagee."

This conclusion is bolstered by the rules of statutory construction which provide that "the intention of the legislature in enacting a statute must be determined primarily from the language of the statute itself."³⁵

It is interesting to note, however, that of the statutes pertaining to chattel mortgages, only two have been retained. Of one of these, Ohio Revised Code section 1319.07, it has been said that the legislative "intendment is against deficiency judgment."³⁶ The other, Ohio Revised Code section 1319.06, protects the consumer in a loan upon household furnishings. Could it be that the legislature intended to provide protection for consumers against deficiency judgment? If that is the case, the provisions of section 1319.07 would apply against any secured party, regardless of the form of transaction, when the debtor was a consumer.

The legislature should clarify the confusion raised by its present enactment.

31. UCC § 9-105, comment 1.

32. 50 OHIO JUR. 2d, *Statutes* § 173 (1961).

33. *Ibid.*

34. *Tufts v. Haynie*, 4 Ohio C.C.R. (n.s.) 494 (Cir. Ct. 1890).

35. 50 OHIO JUR. 2d, *Statutes* § 170 (1961).

36. *Welfare Fin. Co. v. Unger*, 174 N.E.2d 117, 119 (Ohio App. 1960).

Fixtures

Ohio Revised Code section 1309.32(A)³⁷ provides that the Uniform Commercial Code and the rules of the fixture provisions thereof do not apply to

... goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work, and the like and no security interest in them exists under section 1309.01 to 1309.50, inclusive, of the Revised Code unless the structure remains personal property under applicable law.

The determination as to whether and when other goods become fixtures is left to the law of this state other than the Uniform Commercial Code.³⁸ Leaving such determination to non-Code law will create problems for the secured party who must classify collateral as real, personal, or fixture property at the time he undertakes to perfect his security interest.³⁹ There are no clear-cut rules in chapter 1309 of the Ohio Revised Code to aid him in determining what is a fixture.

It is also questionable whether the pre-Uniform Commercial Code decisions under Ohio law in the area of fixtures will be of any great assistance in defining a Code fixture.

The term "fixture" seems to have been most clearly defined in the leading Ohio case of *Teaff v. Hewitt*⁴⁰ where the court stated:

A removable fixture as a term of general application is a solecism — a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property.⁴¹

. . . .

A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it.⁴²

The criteria set forth in that decision in determining a fixture are:

First: Actual annexation to the realty, or something appurtenant thereto. Second: Appropriation to the use or purpose of that part of the realty with which it is connected. Third: The intention of the party making the annexation, to make the article a permanent accession to the freehold — this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the *party* making the annexation,

37. UCC § 9-313(1).

38. Ohio Revised Code section 1309.32 provides:

"The law of this state other than Chapters 1301., 1302., 1303., 1304., 1305., 1306., 1307., 1308., and 1309. of the Revised Code, determines whether and when other goods become fixtures."

39. OHIO REV. CODE §§ 1309.38(A)(2), .39(A), UCC §§ 9-401(1)(b), -402(1).

40. *Teaff v. Hewitt*, 1 Ohio St. 511 (1853).

41. *Id.* at 524-25.

42. *Id.* at 527.

the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.⁴³

This definition and these criteria for determining what is a fixture have been cited and applied in many Ohio decisions.⁴⁴ In accord with the criteria established, the courts of Ohio have held that property annexed to lands may, as between certain parties, be regarded as part of the realty, while, in respect to other parties, the same thing may be treated as retaining its character as personalty.⁴⁵

Ohio Revised Code section 1309.32 deals with interests of a secured party in goods attached to realty as opposed to interests claimed in such realty. Thus, we should consider the law of fixtures in Ohio as it has been applied between these parties. Such interest in the realty may be held as purchaser, mortgagee (prior or subsequent to the interest claimed in the chattel), judgment creditor, or other lienor.⁴⁶

It is recognized in Ohio that an agreement that goods annexed to realty are to remain chattels is binding upon a subsequent purchaser or mortgagee if he has knowledge of the agreement. This is qualified by the condition that the property must be removable without material injury to the realty or to itself.⁴⁷ However, in the absence of notice, the claim of the vendor of chattels annexed to realty under such an agreement will not prevail against a purchaser of the realty.⁴⁸

Prior to the *Holland Furnace* case⁴⁹ the courts of Ohio consistently held that sellers of personal property under a conditional sales contract or chattel mortgage would prevail over the interest of a prior mortgagee where the chattel could be removed without material injury to the realty or the chattel.⁵⁰ However, this was not so where material injury would result.⁵¹

The *Holland Furnace* case stands as authority for the proposition that a prior mortgagee without notice of a conditional sales contract, who is also a bona fide purchaser for value, has priority over the conditional seller of a furnace. In that case the mortgagee of the realty foreclosed and purchased the property at the foreclosure sale. The court found the filing of a conditional sales contract under the statutes pertaining thereto

43. *Id.* at 530.

44. 24 OHIO JUR. 2d, *Fixtures* § 2 (1957).

45. *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563 (1872).

46. 24 OHIO JUR. 2d, *Fixtures*, § 20 (1957).

47. *Id.* § 24, citing *XXth Century Heating & Ventilating Co. v. Home Owner's Loan Corp.*, 56 Ohio App. 188, 10 N.E.2d 229 (1937).

48. *Brennan v. Whitaker*, 15 Ohio St. 446 (1864).

49. *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 19 N.E.2d 273 (1939).

50. 14 OHIO OP. 164 (1939).

51. *Concrete Silo Co. v. Warstler*, 50 Ohio App. 334, 198 N.E. 189 (1935).

not to be constructive notice to the holder of an interest in the realty. The decision was confined to the facts in that case, which involved the "rights of a subsequent purchaser for value, without notice."⁵²

A subsequent mortgagee of the realty takes priority over the conditional seller or chattel mortgagee of chattels annexed to realty if the chattel is of such nature that it is likely to become incorporated into the real estate.⁵³

From the foregoing it will appear that whether an article is a fixture will depend in great part upon its amenability to being removed without material damage to the realty or itself.

Compare the Ohio case law with the concept of a fixture set forth in Ohio Revised Code section 1309.32.⁵⁴ A fixture is neither real nor personal property under section 1309.32.⁵⁵ A security interest in a fixture may be created separate and apart from the realty to which it is attached. Yet, a purchaser of the realty buys such property with the real estate when he has neither actual nor constructive knowledge of the interest of a third person in the fixture. A fixture is a hybrid form of property being part personal and part real.

When a secured party, having an interest in the fixture, has priority under section 1309.32 over the claims of all persons having an interest in the realty, upon default he may remove his collateral from the realty without liability for a diminution in the value of the real estate resulting therefrom.⁵⁶ He must, of course, pay for the cost of repair of any physical injury caused by the removal. The right of removal exists regardless of injury to the freehold.⁵⁷

This concept of a fixture under the Code will be new to Ohio law. The courts will be called upon to lay down rules distinguishing between goods incorporated into the structure and those affixed to real estate in such manner that they become fixtures under the Code requisites. The old tests of attachment in such manner that identity as a chattel is lost or in such manner that it cannot be removed without damage to itself or the freehold would no longer seem to be decisive. Furthermore, filing under the Code is constructive notice in regard to Code fixtures.

The importance of the determination as to whether goods are "fix-

52. *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 57, 19 N.E.2d 273, 277 (1939).

53. 24 OHIO JUR. 2d, *Fixtures* § 24 (1957).

54. A full discussion of the many problems relating to fixtures will be found in Coogan, *Security Interests in Fixtures under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962).

55. UCC § 9-313.

56. OHIO REV. CODE § 1309.32(E), UCC § 9-313(5).

57. Coogan, *Security Interests in Fixtures under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1346 (1962).

tures" arises from the filing requirements of the Code. If the collateral is or is to become a fixture, the instrument filed must contain a description of the real estate concerned⁵⁸ and must be filed in the office where a mortgage on the real estate concerned would be recorded.⁵⁹ As filing public notice is one of the requisites for obtaining a perfected security interest, proper filing in all cases is desired.⁶⁰ Can this be accomplished when the Code sets forth no clear-cut definition of a fixture, but leaves the same to be decided by a jury, perhaps years after the time of filing?

Description of Real Estate Concerned

The requirement that the instrument filed contain a description of the real estate concerned⁶¹ presents its own problems. It may be that the real estate to which the goods are to be annexed is unknown. The secured party, taking the position that it is impossible to have a fixture until the realty is known, files as though the collateral were ordinary goods, not fixtures. If the collateral were classified as business equipment or inventory, the filing might be made only with the Secretary of State.⁶² When, at a later date, the goods are annexed to a parcel of real estate, can the secured party claim that he perfected his security interest in the only way possible at the time and that it remains perfected even though later affixed to real estate? He would find some support in Ohio Revised Code section 1309.38(C)⁶³ which provides:

A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

Such a conclusion can give little comfort to examiners of real estate titles. However, such persons and county recorders have another problem which should be called to their attention. Ohio Revised Code section 1309.39,⁶⁴ in setting forth the formal requisites of a financing statement, does not require the name of the record owner of the real estate to be shown on the financing statement.⁶⁵ This will present no problem when the debtor and the record owner of the realty are one and the same.

58. OHIO REV. CODE § 1309.39(A), UCC § 9-402(1).

59. OHIO REV. CODE § 1309.38(A)(2), UCC § 9-401(1)(b).

60. The requisites for obtaining a perfected security interest are that: there be an agreement that it attach, value be given, the debtor have rights in the collateral, and public notice be given.

61. OHIO REV. CODE § 1309.39(A), UCC § 9-402(1).

62. OHIO REV. CODE § 1309.38, UCC § 9-401.

63. UCC § 9-401(3).

64. UCC § 9-402.

65. Ohio Revised Code section 1309.39(A) requires that a financing statement be signed by the debtor and secured party, give an address for each, and contain a statement indicating the types or describing the collateral.

Consider the situation in which a contractor or subcontractor purchases an item for installation on a specific parcel of realty. He purchases the same on a conditional contract. In filing the financing statement will the secured party show the name of the owner of the realty? If so, will it be conspicuous enough for the county recorder to note and index it accordingly? If not, how can the title examiner be expected to discover such a security interest when it is indexed in the name of the debtor contractor?

The filing officer is required to index each financing statement according to the name of the debtor.⁶⁶ This author finds no requirement for indexing in the name of the record owner of real estate.

Place of Filing

The Code is clear that financing statements covering goods which are or are to become fixtures at the time the security interest attaches are to be filed in the office where a mortgage on the real estate concerned is to be recorded.⁶⁷ In Ohio this is in the office of the county recorder of the county in which the land is located. However, shall such filings be recorded as real estate encumbrances and so indexed or filed as chattel filings and so indexed? If such filings are to fulfill the purpose of alerting examiners of real estate titles and persons dealing with or claiming an interest in the realty to the existence of security interests in property affixed thereto, they must be filed among the real estate records. That this was intended is indicated by the requirement that the instrument filed contain a description of the real estate concerned. The author has been informed that Ohio county recorders are filing financing statements covering fixtures as chattel filings and so indexing them. In at least one county⁶⁸ a separate index of fixture filings is maintained with the real estate records, but the instruments themselves are filed among the chattel filings.

If it was intended that fixture filings be made among the realty records, some clarification is required.

Prior to the enactment of Ohio Revised Code chapter 1309, a mortgage, upon both real and personal property, could be recorded as a real estate mortgage and also indexed as a chattel mortgage under the provisions of pre-Code section 1319.02. This section was repealed by the Code. There is now no authority for recording as both a chattel and a real estate mortgage. The duration of a filing under chapter 1309 is five years unless an earlier maturity date is stated.⁶⁹ If a real estate

66. OHIO REV. CODE § 1309.40(D), UCC § 9-403(4).

67. OHIO REV. CODE § 1309.38(A)(2), UCC § 9-401(b).

68. Franklin County.

69. OHIO REV. CODE § 1309.40(B), UCC § 9-403(2).

mortgagee also wishes to cover fixtures under section 1309.32⁷⁰ for the same period as the life of the real estate mortgage, it will be necessary to repeat such filings regularly. This problem could be eliminated by the re-enactment of section 1319.02 in amended form.

REFERENCES TO NON-CODE LAW

*Section 1309.17*⁷¹

The matters falling in this category should properly be designated questions as to what is the Ohio law, and what is its effect on the Uniform Commercial Code where reference is made thereto, rather than problems wrought by the Code.

The first reference is found in Ohio Revised Code section 1309.17. This section validates agreements by a buyer not to assert against an assignee any claim or defense which he may have against his seller, but only as to defenses which could be cut off if a negotiable instrument were used. This section is made "subject to any statute or decision which establishes a different rule for buyers of consumer goods."

An examination of the statutes and reported decisions relative to this subject in Ohio fails to disclose any distinction between buyers of consumer goods and other buyers with respect to such agreements. The courts of Ohio have found finance companies and others regularly discounting consumer paper not to be holders in due course.⁷² However, it has generally been recognized that they may be holders in due course.⁷³ If such assignees are consistently held to be holders in due course when the debtor is a consumer, the agreement not to assert defenses will be meaningless.

*Section 1309.29*⁷⁴

Ohio Revised Code section 1309.29 gives priority to the lien of one furnishing services or materials with respect to goods subject to a security interest over a perfected security interest.⁷⁵ This rule is subject to a few qualifications. The services must have been rendered in the ordinary course of business. The lien must be upon goods in the posses-

70. UCC § 9-313.

71. UCC § 9-206.

72. *Davis v. Commercial Credit Corp.*, 87 Ohio App. 311, 94 N.E.2d 710 (1950).

73. *Springfield Loan Co. v. National Guar. & Fin. Co.*, 27 N.E.2d 257 (Ohio Ct. App. 1939).

74. UCC § 9-310.

75. Ohio Revised Code section 1309.29 provides:

"When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise."

sion of the person rendering the service or furnishing the materials. Such lien takes priority, unless the lien is statutory and the statute granting the lien expressly provides otherwise.

Statutory liens in Ohio are dealt with in chapter 1311 of the Ohio Revised Code.⁷⁶ A review of these liens does not reflect any statute providing that a perfected security interest shall take priority over the lien granted by that statute. Section 1309.29 is most often questioned in respect to garagemen's liens for services rendered upon motor vehicles. The garageman's lien is a common-law lien.⁷⁷ It is not one granted by statute. Thus, the "unless" clause contained in Ohio Revised Code section 1309.29 is not applicable to a garageman's lien, and that section has the effect of giving a garageman's lien priority over a perfected security interest.

Does the Ohio Certificate of Motor Vehicle Title Act affect the provisions of section 1309.29? No decisions directly in point on the question of the priority of a garageman's lien over a mortgage lien recorded on a certificate of title can be found. There are decisions holding that a chattel mortgage recorded prior to the services performed by the garageman will take priority over the artisan's lien in the absence of consent by the mortgagee to performance of the work.⁷⁸ However, these decisions were rendered prior to the enactment of the Certificate of Motor Vehicle Title Act.

Ohio Revised Code section 4505.04, dealing with certificates of title, has been construed to prevent the proof of any claim or interest in a motor vehicle by the actual owner of the vehicle⁷⁹ in the absence of presentation of the certificate of title, proof of equitable claims,⁸⁰ or a bailee's interest.⁸¹

Two decisions arising under section 4505.04 are worthy of note. In *Schiefer v. Schnaufer*⁸² the court held that a mechanic with a validly recorded Indiana garageman's lien could not prevail against a purchaser

76. Ohio Revised Code sections 1311.02-38 deal with the mechanics liens; Ohio Revised Code sections 1311.39-47 deal with liens of railroad subcontractors; Ohio Revised Code sections 1311.48-51 deal with liens for care of animals; Ohio Revised Code sections 1311.65-68 deal with public works liens; and Ohio Revised Code section 1307.15 deals with the lien of the warehouseman.

77. 9 OHIO JUR. 2d, *Chattel Mortgages* § 103 (1954).

78. *Id.* § 104, citing *Metropolitan Secs. Co. v. Orlow*, 107 Ohio St. 583, 140 N.E. 306 (1923); *Cleveland Auto Top & Trimming Co. v. American Fin. Co.*, 124 Ohio St. 169, 177 N.E. 217 (1931).

79. *Kelley Car Co. v. Finkler*, 155 Ohio St. 541, 99 N.E.2d 665 (1951); *Mielke v. Leeberson*, 150 Ohio St. 528, 83 N.E.2d 209 (1948).

80. *Butler v. Case*, 161 Ohio St. 288, 118 N.E.2d 836 (1954); *Garlick v. McFarland*, 159 Ohio St. 539, 113 N.E.2d 92 (1953); *Finance Co. v. Munday*, 137 Ohio St. 504, 30 N.E.2d 1002 (1940).

81. *Peitsmeyer v. Omar Baking Co.*, 95 Ohio App. 37, 117 N.E.2d 184 (1952).

82. 71 Ohio App. 431, 50 N.E.2d 365 (1943).

in Ohio holding a certificate of title which contained no notation of the lien. In that case the Indiana owner brought the car to Ohio and obtained a certificate of title before selling the vehicle.

In the case of *Justice v. Bussard*,⁸³ it was held that the common-law lien of an artisan from repairs to an automobile is not abolished by section 4505.04. However, that suit involved the artisan and the owner of the vehicle, not a holder of a certificate-noted lien.

In view of the explicit language of section 4505.04 and the decision law, the last case would seem to state a rather doubtful rule. The decisions based on section 4505.04 would seem to follow pre-certificate of title decisions, that a recorded (noted on certificate of title) chattel mortgage will take priority over an artisan's lien.

Section 1309.29 reverses this rule with respect to non-certificate of title collateral. The decisions under section 4505.04 and the language of section 4505.13 point to the conclusion that section 1309.29 will not change the pre-Code Ohio law, that a garageman's lien will not take priority over a prior lien noted upon a certificate of title.

Section 1309.29 will give priority to statutory and other common-law liens over perfected security interests. Persons protected by such liens in Ohio include artisans, tradesmen, mechanics, and laborers who receive property for the purpose of mending, repairing, and improving its condition.⁸⁴

PRE-CODE TRANSACTIONS

The Uniform Commercial Code contains a tenth article. This article deals with the effective date and repealer. Uniform Commercial Code section 10-101 reads: "This Act shall become effective at midnight on December 31st following its enactment. It applies to transactions entered into and events occurring after that date."

Ohio did not adopt this provision. In an attempt at clarification the following language was substituted:⁸⁵

This act shall take effect on July 1, 1962.

Transactions validly entered into before such date and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.

Instruments, documents, or notices filed prior to July 1, 1962, in accordance with the law at the time of such filings shall be deemed to be filed under section one of this Act as of the original date of filing

83. 114 N.E.2d 305 (Ohio Munic. Ct. 1953).

84. 34 OHIO JUR. 2d, *Liens* § 17 (1958).

85. 129 Ohio Laws 13, 182 (1961).

and may be continued or terminated as provided in section one of this act.

The questions which have arisen are: (1) Do pre-Code filings still effective on July 1, 1962, become effective for the time prescribed in the Uniform Commercial Code, to wit, five years? (2) Is the old cancellation form or the new termination form to be used? (3) Since the Uniform Commercial Code provides for a one dollar fee for termination of filings, may county recorders charge such fee for cancellation of existing pre-Code filings?

These problems have been presented to the Attorney General of Ohio and he has ruled thereon. To date this opinion stands as the only authority on these questions.⁸⁶ Decisions rendered in other states would not be relevant as the language considered is peculiar to Ohio.

The Attorney General has ruled that instruments and documents filed and effective as of July 1, 1962, will be effective for five years from the original date of filing. Such filings must be continued or terminated under the new law, and county recorders may charge the new fee of one dollar for such termination.

SUMMARY

New problems have arisen as a result of the adoption of article 9 of the Uniform Commercial Code in Ohio. Except in the area of fixtures, these problems arise not from the Code but from peculiarities in Ohio law, notably the Certificate of Motor Vehicle Title Act. In the area of fixtures the Ohio courts will be called upon to give new meaning to the term "fixtures" as it is used in the Code. Some practical problems have arisen as demonstrated by the questions considered by the Attorney General. On the whole, however, a period of over five months under article 9 of the Uniform Commercial Code has demonstrated it to be workable and containing fewer problems than anticipated.

86. 1962 OPS. ATT'Y GEN. (Ohio) 3072.